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VIA ECFS ***EX PARTE***

April 23, 2009

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Suite TW-A325
Washington, DC 20554

Re: ***Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island*, WC Docket No. 08-24; *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area*, WC Dkt. No. 08-49**

Dear Ms. Dortch:

One Communications Corp., tw telecom inc., Integra Telecom, Inc., and Cbeyond, Inc. (collectively, the "Joint Commenters"), through their undersigned counsel, hereby submit this letter in response to Verizon's March 9th[1] and April 10th Ex Parte Letters[2] in the above-referenced dockets. In particular, the Joint Commenters (1) respond to Verizon's recent criticisms of the new standard for assessing incumbent LEC petitions for forbearance from unbundling obligations proposed by a coalition of competitors, including the Joint Commenters, on March 26, 2009 (the "Proposed Standard");[3] and (2) explain why Verizon still fails—despite its submission of updated evidence for the

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[1] Letter from Dee May, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 08-24 & 08-49 (filed Mar. 9, 2009) ("Verizon March 9th Ex Parte Letter" or "March 9th Ex Parte Letter").

[2] Letter from Nneka Ezenwa, Director, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 08-24 & 08-49 (filed Apr. 10, 2009) ("Verizon April 10th Ex Parte Letter" or "April 10th Ex Parte Letter").

[3] *See* Letter from Andrew D. Lipman et al., Counsel for Alpheus Communications, L.P. et al., to Marlene H. Dortch, Secretary, FCC, *In re Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island*, WC Dkt. No. 08-24; *In re Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Cox's Service Territory in the Virginia*

Rhode Island and Virginia Beach markets—to meet the Commission's existing standard for assessing such petitions.

I. The Proposed Standard's Requirement That At Least Two Facilities-Based Wireline Competitors To The ILEC, Each Of Which Has A 15 Percent Market Share In The Relevant Product Market, Must Be Present Before Forbearance Can Be Granted Is Sound From Both A Legal And An Economics Perspective.

In its April 10th Ex Parte Letter, Verizon claims that the Proposed Standard is "fatally flawed" because (1) the requirement that at least two facilities-based competitors to the incumbent LEC, each of which has captured at least 15 percent of the market share in the relevant product market, before forbearance may be granted is inconsistent with the Communications Act and the D.C. Circuit's opinion in *USTA I*[4] and (2) there is no basis for excluding wireless carriers from the relevant wireline markets.[5] These assertions have no merit.

First, the history of the FCC's unbundling regime after the *USTA I* decision, including the D.C. Circuit's *USTA II*[6] decision, demonstrates that the two competitors and minimum market share requirements in the Proposed Standard are entirely lawful. In *USTA I*, the court held that (1) the FCC's initial adoption of broad unbundling requirements failed to account for the costs of unbundling (*i.e.,* disincentives for investment and the costs of shared network management); and (2) the FCC adopted the line sharing requirement without considering the relevance of cable's substantial success in serving mass market broadband customers.[7] On remand from the *USTA I* decision, in the *TRO*,[8] the Commission adopted an entirely new unbundling framework. The FCC determined that a requesting carrier is "impaired" where denial of access to a UNE is likely to make entry into a market "uneconomic."[9] This approach accounted for the costs of unbundling by limiting the availability of unbundled network elements ("UNEs") to circumstances in which it is inefficient—due to structural impediments to entry—for competitors to replicate incumbent LEC facilities. Importantly, under its

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Beach Metropolitan Statistical Area, WC Dkt. No. 08-49 (filed Mar. 26, 2009) ("Joint Commenters' March 26th Ex Parte").

[4] *See* Verizon April 10th Ex Parte Letter at 9 (citing *United States Telecom. Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*")).

[5] *See* Verizon April 10th Ex Parte Letter at 7-10.

[6] *United States Telecom. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

[7] *See USTA I*, 290 F.3d, at 422-29.

[8] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978 (2003) ("*TRO*") (subsequent history omitted).

[9] *TRO* ¶ 84.

new unbundling framework, the FCC held that "we do not find the presence of intermodal alternatives dispositive in our impairment analysis, as some commenters suggest."[10] The Commission held that it would instead examine the extent to which the presence of an intermodal competitor demonstrated that the relevant barriers to deploying network facilities could be overcome by competitors *other than a single intermodal competitor*.[11] For example, the FCC expressed skepticism that the cable companies' provision of relevant services over their own facilities demonstrated a lack of impairment for non-cable companies because cable companies had benefited from historic advantages that other competitors lack (*e.g.*, "first-mover advantages and scope economies not available to other new entrants").[12] The obvious implication is that the presence of a single intermodal competitor in the market is not sufficient, by itself, to demonstrate the absence of impairment. Finally, the FCC acknowledged that "retail competition from multiple market participants that do not rely on incumbent LEC facilities at all may well demonstrate" that competitors are unimpaired,[13] but it declined to set a specific level of retail competition above which impairment does not exist.[14]

With regard to loop facilities, the FCC applied its new definition of impairment while at the same time relying on the "at a minimum" language in Section 251(d)(2) to eliminate UNE loop facilities "where some level of impairment may exist, but unbundling appeared likely to undermine important goals of the 1996 Act."[15] The most important of these goals, in the Commission's view, was the promotion of the deployment of advanced services pursuant to the policy objectives set forth in Section 706.[16] Accordingly, the Commission held that incumbent LECs must continue to unbundle legacy copper loops, including conditioned copper loops, as well as legacy TDM DS1 and DS3 loops, because those facilities met the new impairment standard and mandatory unbundling of those facilities would not have a significant detrimental impact on incentives to deploy next-generation broadband facilities.[17] Significantly, the FCC retained unbundling requirements for conditioned copper loops used to provide mass market broadband service even though it fully recognized that cable companies served more mass market broadband customers than incumbent LECs.[18] At the same time, the

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[10] *Id.* ¶ 97 (citing Verizon Comments at 46-48).

[11] *See id*. ¶¶ 97-98.

[12] *See id.* ¶ 98.

[13] *See id*. n.392.

[14] *See id.* ¶ 114.

[15] *Id.* ¶ 173.

[16] *See id.*

[17] *See id.* ¶¶ 248-254 (mass market copper loops); *see also id.* ¶¶ 325-327 (DS1 loops); *id.* ¶¶ 320-324 (DS3 loops).

[18] *See id.* ¶¶ 51-52 (describing incumbent LEC and cable broadband market shares).

Commission eliminated loop unbundling requirements that it believed would create significant disincentives for investment in broadband, such as those applicable to newly deployed fiber loops and certain components of hybrid fiber-copper loop facilities.[19] This was so, even though competitors were likely impaired without access to many such facilities.[20] Thus, the FCC candidly chose to stimulate vibrant competition *from at least two non-incumbent LEC competitors* (*e.g.*, a cable company and a second non-incumbent LEC competitor) in the markets for which legacy copper and TDM facilities are inputs while tolerating less competition in the markets that could only be served via new fiber loop facilities.

On appeal, the D.C. Circuit stated that the FCC's new definition of impairment "explicitly and plausibly connects factors to consider in the impairment inquiry" to the relevant structural impediments to entry.[21] The court stated further that the FCC could balance the costs and benefits of unbundling either by "hewing rather closely to natural monopoly features" or by adopting "a looser concept of impairment, with the costs of unbundling brought into the analysis under § 251(d)(2)'s 'at a minimum' language."[22] Under an approach that hews "rather closely to natural monopoly features," unbundling would likely be eliminated where a single competitor enters the market. Under the "looser concept of impairment," unbundling not otherwise inconsistent with Section 706 would be retained until it could be demonstrated that multiple non-incumbent LECs could replicate incumbent LEC facilities. The court stated that it "cannot fault" the FCC for adopting the "looser" approach.[23] Indeed, the court confirmed that the broader structure of the Act "suggests that 'impair' *must* reach a bit beyond natural monopoly."[24] While the court found fault with other aspects of the *TRO*, these fundamental observations, as well as the Commission's underlying interpretation of "impairment" and its application to loop facilities as discussed herein, remain good law today.[25]

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[19] *See id.* ¶¶ 273-280 (fiber-to-the-home loops); *see also id.* ¶¶ 288-295 (hybrid loops).

[20] *See, e.g., id.* ¶¶ 173, 286, 295.

[21] *See USTA II*, 359 F.3d, at 571-72.

[22] *Id.* at 572.

[23] *Id.*

[24] *Id.* (emphasis added).

[25] The D.C. Circuit held that the FCC must clarify the type of competitor for which entry must be uneconomic under the FCC's impairment standard. *See USTA II*, 359 F.3d, at 572. On remand, the FCC clarified that, under its interpretation of the impairment standard, the relevant question is whether entry is uneconomic for a reasonably efficient competitor. *See Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533, ¶ 24 (2005) ("*TRRO*") (subsequent history omitted). The FCC went on to explain that the existence of a competitor (such as a cable company) that possesses unique advantages that enable it to enter a market does not render other competitors that lack such advantages inefficient and, accordingly, entry by a uniquely situated competitor does not prove the absence of

There should be no doubt, therefore, that the Proposed Standard rests on firm legal ground. Even if Verizon were correct in asserting that the "impairment" standard governs the circumstances in which forbearance from unbundling should be granted, the FCC's "looser concept of impairment" applies to the legacy copper and TDM loop facilities at issue in the pending forbearance proceedings. Again, under the Commission's approach, the presence of a single cable competitor is *not* sufficient to show that entry is economic for other competitors and that, therefore, UNEs can be eliminated. It must be clear that competitors other than those that benefit from unique historic advantages can enter the market. A requirement that at least two firms have widely deployed their own loops throughout an MSA is entirely consistent with this approach because it is highly likely that one of the firms that has deployed loop facilities will be a cable company.

Moreover, it is also consistent with the FCC's interpretation of impairment to require, as a prerequisite for forbearance, that *each* of the two facilities-based non-incumbent LEC competitors has independently proven its viability as a competitor to the incumbent by achieving a nominal level of market share in the relevant market. Such a showing merely demonstrates that it is economic for at least two non-incumbent LEC competitors to rely on their own facilities.

That forbearance might be denied in a market in which a single intermodal competitor has achieved very significant market share also does not raise legal concerns. As explained, the Commission retained unbundling obligations for conditioned copper loops in the *TRO* even though it fully recognized that cable companies served more mass market broadband customers than incumbent LECs.[26] The FCC should therefore reject Verizon's argument that the Proposed Standard is inconsistent with existing precedent.

But the Proposed Standard is not just legally sound; it is also economically sound. Both economic theory and the available empirical evidence indicate that more than one viable competitor to the incumbent is usually required to prevent the harms to consumer welfare, namely supra-competitive prices, resulting from duopoly markets.[27] As explained in the record by Dr. Stanley M. Besen,

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impairment. *See id.* ¶ 26 & n.77. The FCC therefore reaffirmed the fundamental point that entry by a single competitor with unique advantages does not justify elimination of UNEs in a market.

[26] Verizon claims that it is illogical for the Proposed Standard to grant forbearance in a market in which two competitors have a 30 percent combined market share but to deny forbearance in a market in which a single competitor has 50 percent market share and three other competitors each have 10 percent market share. *See* Verizon April 10th Ex Parte Letter at 9. This a red herring. Obviously the FCC retains the discretion to address outlier situations such as the one Verizon imagines. *See* Joint Commenters' March 26th Ex Parte, at Attachment ("In extraordinary circumstances, the FCC may depart from [the Proposed Standard] and reach a different conclusion as to whether to grant or deny a petition for forbearance from unbundling obligations than would otherwise apply under [the Proposed Standard].").

[27] *See generally* Declaration of Dr. Stanley M. Besen, attached to Letter from Andrew D. Lipman, Counsel for TDS Metrocom, LLC et al. & Thomas Jones, Counsel for Cbeyond, Inc. et al., to Marlene

numerous theoretical models predict that "duopoly more typically leads to higher prices than would prevail in a market with a larger number of firms and that the entry of additional firms would result in lower prices."[28] Likewise, in empirical studies of various markets and industries (including those with low-entry barriers such as bid auction markets, food retailing, and tires), "a common finding is that the presence of three or more significant competitors tends to result in lower prices than those that prevail in duopoly."[29] Based on these findings, Dr. Besen has concluded that, without conducting more analysis, "the FCC cannot conclude that the presence of only two firms is sufficient to achieve a competitive outcome and they can reasonably presume that the entry of a third firm is likely to result in prices that are closer to competitive levels."[30] Moreover, if "the presence of a third substantial competitor results in a significant reduction in prices"[31] in markets with *low barriers to entry*, then it must be especially so in markets with *high barriers to entry*, such as the telecommunications markets at issue in the instant forbearance proceedings. Thus, requiring that at least two competitors to the incumbent LEC are present in the relevant product market before granting forbearance in that market is precisely the approach that the FCC should take in assessing pending and future UNE forbearance petitions. If anything, such an approach is a conservative one. As explained by Dr. Besen, a number of empirical studies suggest that, in some markets, the presence of a fourth, fifth, or additional firms might result in even lower prices, thereby demonstrating that even three substantial firms may not be sufficient for competitive pricing.[32]

Furthermore, the requirement that each of the two facilities-based competitors has captured at least 15 percent of the market share in the relevant product makes economic sense because the existence of a competitor that has captured only a *de minimis* market share may have no constraining effect on the incumbent LECs' prices. As Dr. Besen explains, empirical evidence suggests that while the presence of a third "substantial" firm would reduce the otherwise high price-cost margins of the two leading firms in a duopoly market, "a third firm with only a small market share might have little

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H. Dortch, Secretary, FCC, WC Dkt. Nos. 08-24 & 08-49 (filed Apr. 23, 2009) ("Dr. Besen Declaration").

[28] *Id.* at 2.

[29] *Id.* at 3. According to Dr. Besen, in the cellular context, "the FCC itself has recognized that duopolies cannot be expected to price competitively and that the entry of additional firms could be expected to lead to lower prices. *See id.* at 11 & n.30 (citing *In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Radio Services*, First Report, 10 FCC Rcd. 8844, ¶ 4 (rel. Aug. 18, 1995)).

[30] Dr. Besen Declaration at 17.

[31] *Id.* at 8.

[32] *See id.* at 9-10.

effect."[33] In fact, one empirical study on the effect of market share distribution on industry price-cost margins has found that the presence of a third firm in a market affects prices once the third firm's market share is greater than or equal to 16 percent.[34] Similarly, evidence developed during the Federal Trade Commission's review of a proposed merger between two retail "superstores" shows that the presence of a third major firm had a moderating effect on prices, but the presence of smaller retail outlets did not.[35] Based on this evidence, Dr. Besen has concluded that "without further analysis, one should not be too quick to count fringe or differentiated players as being fully equivalent to major direct competitors."[36] Thus, it is entirely reasonable, and in fact, necessary, to require that a "competitor" under the Proposed Standard have at least a 15 percent market share in the relevant product market.

Second, it is entirely consistent to recognize only wireline providers as "competitors" for purposes of assessing competition under Section 10 because the Commission itself has found that "the majority of households do not view wireline and wireless services to be direct substitutes."[37]

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[33] *Id.* at 8.

[34] *See id.* n.17.

[35] *See id.* at 14 (citing *Federal Trade Commission v. Staples, Inc*., 970 F. Supp. 1066, 1078 (D.D.C. 1997)).

[36] *Id.* at 14.

[37] *In re High-Cost Universal Service Support et al.*, Notice of Proposed Rulemaking, 23 FCC Rcd. 1467, ¶ 10 (2008). As the Joint Commenters have already explained in this proceeding, it is also entirely reasonable to "count" only facilities-based providers as "competitors" for purposes of assessing competition under Section 10. *See, e.g.,* Letter from Thomas Jones, Counsel for One Communications Corp. et al, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 08-24, at 12 (filed Dec. 3, 2008) ("Joint Commenters' December 3rd Ex Parte Letter") (explaining that competition from providers using Verizon's Wholesale Advantage product and competition based on resale cannot be included in the Commission's calculation of competitors' market share in forbearance analyses because such competition relies on Verizon's own facilities). Verizon states that "[t]here is no UNE loop or other UNE component that is part of Verizon's Wholesale Advantage service and Wholesale Advantage is sold pursuant to commercially negotiated agreements and neither the loop nor any other portion of that service is purchased as a UNE pursuant to an interconnection agreement." Verizon March 9th Ex Parte Letter at 6 (internal citation omitted). But the availability of voice grade loop facilities as UNEs constrains the prices that Verizon can charge for loop facilities offered pursuant to commercial arrangements. Accordingly, consistent with its prior decisions, the FCC should give no weight to the existence of such commercial agreements. *See, e.g., In re Petitions of the Verizon Tel. Cos. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach MSAs*, Memorandum Opinion and Order, 22 FCC Rcd. 21293, ¶ 42 (2007) ("*6-MSA Order*") (rejecting evidence of competition that relies on special access loops that are constrained by the presence of UNEs); *see also In re Petitions of Qwest Corp. for*

Moreover, Verizon's own pricing behavior reveals that it does not believe that most of its customers view mobile wireless voice service as a substitute for wireline voice service. An examination of Verizon's Rhode Island tariff filings over the past few years[38] demonstrates that Verizon has not been decreasing, and in many cases has been increasing, its wireline telephone service for residential customers.[39] There are two exceptions to this pattern. The first is that Verizon has offered discounts to customers that threaten to disconnect or decide to reconnect to Verizon's wireline voice service.[40] The second exception is that Verizon has offered discounts for wireline voice service bundled with video

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Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle MSAs, Memorandum Opinion and Order, 23 FCC Rcd. 11729, ¶ 41 (2008) ("*4-MSA Order*").

[38] A chart describing each of Verizon's residential services tariff filings with the Rhode Island Public Utilities Commission ("PUC") between January 1, 2006 and April 10, 2009 is attached hereto as Exhibit A.

[39] For example, between January 1, 2006 and April 10, 2009, Verizon twice increased rates for its Verizon Local Packages (includes unlimited local calling) and Verizon Regional Packages (includes unlimited regional toll calling). *See id.* (citing to RI PUC Dkt. Nos. 3824 & 3940). During the same period, Verizon increased the rates for numerous custom calling features (such as call waiting and caller ID) three times. *See id.* (citing to RI PUC Dkt. Nos. 3751, 3835, and 3950). Verizon also increased rates for certain Directory Assistance and Directory Listing services twice. *See id.* (citing to RI PUC Dkt. Nos. 3736 & 3823).

[40] For example, on March 9, 2007, Verizon filed notices with the Rhode Island PUC to introduce several promotional offerings. *See id.* (citing to RI PUC Dkt. No. 3828); *see also* Docket No. 3828 - Verizon Rhode Island - Notice to Introduce Promotional Offerings for Residential Service, http://www.ripuc.ri.gov/eventsactions/docket/3828page.html (last visited Apr. 20, 2009). Among them were promotions in which (1) any "residential voice customers who call Verizon Rhode Island and indicate that they intend to disconnect their Verizon local service" and then decide to "retain their Verizon service and subscribe to" select wireline voice plans, such as the "Regional Value" plan, would receive credits on their bills; and (2) any "residential customers who call to establish new local service with Verizon Rhode Island," regardless of whether they are "[n]ew customers or customers who are returning to Verizon[,] will be eligible for [] promotional bill credit[s]." *See* Letters from Theresa L. O'Brien, Vice President - Rhode Island Regulatory Affairs, Verizon, to Luly E. Massaro, Commission Clerk, Rhode Island Public Utilities Commission, Docket No. 3828 at 1 (filed Mar. 9, 2007). *See also, e.g.*, Exhibit A (citing to RI PUC Dkt. No. 3917) (introducing a 12-month voice discount to customers who are either considering disconnecting Verizon service, have requested the disconnection of Verizon service, or are disconnecting Verizon service with a competitor to establish service with Verizon); *id.* (citing to RI PUC Dkt. No. 3934) (introducing a one-time bill credit of $25 for residential customers who call Verizon to disconnect their telephone service or have taken steps to disconnect their Verizon service and decide to stay with Verizon, and a $50 credit to customers who re-establish service with Verizon after moving and disconnecting their service).

service or broadband service, or both video and broadband services.[41] If Verizon believed that more than a relatively small minority of wireline voice subscribers viewed mobile wireless voice service as a substitute for wireline voice service, then Verizon would decrease the prices (and certainly not *increase* the prices) it charges to *most or all* of its wireline customers. Instead, Verizon has decreased prices for only narrowly defined subsets of its larger wireline customer base. The first subset consists of customers that are considering "cutting the cord" or have already "cut the cord." These customers likely have unusually high demand elasticities and apparently consider mobile wireless voice service to be a substitute for wireline voice service. The second subset of customers are those that demand a bundle of services not offered by mobile wireless carriers. It follows that Verizon does not believe that the majority of its landline voice customers perceive mobile wireless voice service to be a substitute for landline voice service.

This conclusion is consistent with the findings in a recent report issued by a California consumer advocate organization, The Utility Reform Network ("TURN").[42] The *TURN Report* discusses Verizon's plans,[43] as reported in the *Wall Street Journal*,[44] to consider offering a $5 monthly voice service that would permit subscribers to receive calls and make calls to only 911 and Verizon customer service. The $5 landline offer would be available only to existing Verizon customers who threaten to "cut the cord" and who also purchase Verizon broadband service.[45] According to the *TURN Report*, Verizon's strategy demonstrates that it does not view mobile wireless service as a widespread threat to its landline business:

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[41] For instance, on January 18, 2008, Verizon introduced new monthly discounts for new customers that subscribe to Verizon's "Regional Essentials" phone service, as well as an unlimited long distance plan and a FiOS product or a combination of FiOS products, under a one or two-year commitment plan (*i.e.*, the "Regional Essentials FiOS Bundle Discount"). *See* Exhibit A (citing to RI PUC Dkt. No. 3916). In another example, on April 1, 2008, Verizon offered renewal discounts for customers subscribing to the Regional Essentials FiOS Bundle Discount under a one-year plan. *See* Exhibit A (citing to RI PUC Dkt. No. 3941); *see also, e.g., id.* (citing to RI PUC Dkt. No. 3989) (introducing a 12-month bundle discount for "Regional Value" local phone service with a qualifying unlimited long-distance calling plan when bundled with Verizon On-line Broadband or DIRECTV, or both).

[42] *See generally*, Trevor R. Roycroft Ph.D., *Why "Competition" is Failing to Protect Consumers*, Full Report, Prepared on Behalf of TURN (The Utility Reform Network) (Mar. 25, 2009), http://www.turn.org//downloads/TURN-Telco-Competition-Is-Failing-Full-Report.pdf ("*TURN Report*").

[43] *See id.* at 14.

[44] *See* Amol Sharma, "Verizon May Offer Landline Plan for $5," *Wall Street Journal*, Feb. 17, 2009, http://online.wsj.com/article/SB123483395304696039.html.

[45] *See id.*

> This pricing response may buck the trend of rising basic rates[;] however, the fact that the $5 service envisioned by Verizon places substantial limits on calling, and may only be available as part of a bundle, suggests a market segmentation strategy, rather than a broad competitive pricing response. . . . Verizon recognizes that cord cutting is likely to impact only certain customers, and the trick will be determining which customers are at risk. . . . [T]he Verizon strategy also illustrates that Verizon does not perceive the threat posed by cord cutting to rise to the level of requiring an across-the-board pricing response, or even rise to the level of promoting a low-priced wireline à la carte offering.

TURN Report at 14.

Given the reality that only a relatively small subset of wireline customers views mobile wireless voice service as a substitute for wireline voice service, the FCC should disregard the presence of mobile wireless competitors in its forbearance analysis. As explained in the record, the relevant inquiry when considering the inclusion of mobile wireless in the wireline voice market is whether mobile wireless effectively constrains Verizon's prices for the customers that have *not* cut the cord.[46] As the discussion herein demonstrates, this is not the case for the vast majority of Verizon's wireline voice customers (those that have not and will not cut the cord). There is no reason, therefore, to consider providers of mobile wireless services to be "competitors" under the Proposed Standard.[47]

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[46] *See, e.g.,* Joint Commenters' December 3rd Ex Parte Letter at 9; *see also* Declaration of Dr. Michael D. Pelcovits, attached to Letter from Samuel L. Feder, Counsel for Cavalier Telephone & TV, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 08-24 & 08-49, at 15 (filed Apr. 21, 2009) ("Dr. Pelcovits Declaration").

[47] There is also no reason to consider fixed wireless providers to be "competitors" under the Proposed Standard. To begin with, the Commission has never considered fixed wireless providers in its market share analysis under its existing forbearance standard. Indeed, in the *4-MSA Order* (n.137), the FCC expressly rejected Qwest's argument that Nextlink, a fixed wireless provider, was a viable alternative source of wholesale inputs. In addition, as explained by the Joint Commenters, Verizon has not provided any specific evidence to support its claims that fixed wireless providers can provide substitutes for the retail voice and data services demanded by business customers in the Rhode Island or Virginia Beach markets. *See* Opposition of One Communications Corp. et al., WC Dkt. No. 08-24, at 43 (filed Mar. 28, 2008) ("Joint Commenters' Rhode Island Opposition") (citing Verizon Rhode Island Forbearance Petition at 28-29); *see also* Opposition of One Communications Corp. et al., WC Dkt. No. 08-49, at 42-43 (filed May 13, 2008) (citing Verizon Virginia Beach MSA Forbearance Petition at 28-29).

II. Verizon Still Cannot Demonstrate That It Meets The Commission's Existing Standard For Forbearance In Rhode Island Or The Virginia Beach MSA.

A. Despite Its Submission Of Updated "Cut-The-Cord" Data, Verizon Has Failed To Demonstrate That Mobile Wireless Customers Should Be Included In The Commission's Calculation Of Competitors' Market Share.

Even if Verizon were correct that mobile wireless service should be included in the Commission's forbearance analysis (which it should not), Verizon's attempt to artificially inflate the percentage of customers that "cut the cord" in Rhode Island and the Virginia Beach MSA should be rejected.[48] *First*, Verizon's insistence that the FCC should rely on the *national* percentage of cut-the-cord households estimated by the Centers for Disease Control and Prevention ("CDC") in its latest survey[49] is inconsistent with Commission precedent. In the *4-MSA Order*, the FCC expressly "decline[d]" to "rely on the national wireless-only household data published by the [CDC]" because such data was not sufficiently geographically-specific and reliable.[50] Indeed, use of the national cut-the-cord figure would likely substantially overstate the incidence of cord cutting in the Rhode Island and Virginia Beach markets. For example, as of June 2007, the latest date for which any state-specific information from the CDC is available, the percentages of wireless-only households and adults in Rhode Island were 6.8 percent and 4.4 percent, respectively, whereas the percentages of wireless-only households and adults nationwide were 13.6 percent and 12.6 percent, respectively.[51] In addition, in the record, Dr. Michael Pelcovits cautions against using the CDC's nationwide cut-the-cord estimate because "it is heavily influenced by certain demographic groups," and therefore, unreliable.[52]

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[48] As the Joint Commenters have explained, Verizon's estimates of cut-the-cord mobile wireless customers in Rhode Island and the Virginia Beach MSA are inflated in part because, under the FCC's reasoning in prior decisions, AT&T's mobile wireless customers should not be included. *See, e.g.,* Joint Commenters' December 3rd Ex Parte Letter at 9-11.

[49] *See* Verizon April 10th Ex Parte Letter at 5.

[50] *4-MSA Order* ¶ 21.

[51] *See* Stephen J. Blumberg & Julian V. Luke, National Center for Health Statistics, Centers for Disease Control and Prevention, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January-June 2008* (rel. Dec. 17, 2008), http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200812.pdf; Stephen J. Blumberg et al., National Center for Health Statistics, Centers for Disease Control and Prevention, *Wireless Substitution: State-Level Estimates from the National Health Interview Survey, January-December 2007* (rel. Mar. 11, 2009), http://www.cdc.gov/nchs/data/nhsr/nhsr014.pdf.

[52] *See* Dr. Pelcovits Declaration n.14 ("Drawing conclusions from a nationwide number is very dangerous, because it ignores the differences between customers based on how they use telephone services. Consequently, this can lead to erroneous conclusions about the ability of Verizon to raise prices to the customers that have not yet cut the cord.").

Second, Verizon overreaches with its alternative argument that the Commission should use the CDC's state-specific estimates of cut-the-cord households as of June 2007, "once they are adjusted, as they should be, for the significant degree of cord cutting since that time."[53] In particular, Verizon claims that, because the author of that CDC report told the Associated Press that one would expect the estimates in each state to be higher today, "'perhaps by 5 percentage points or more,'" the FCC should add at least 5 percentage points to the Rhode Island and Virginia-specific estimates as of June 2007.[54] But this is pure speculation on the part of the author. Moreover, Verizon selectively ignores the very next sentence in the author's statement. He opines, "*What we don't know is whether the rate of growth is the same in every state*."[55] Thus, arbitrarily adding 5 percentage points to the Rhode Island and Virginia-specific estimates as of June 2007 would render the data completely unreliable.

Third, Verizon itself concedes that the CDC's state-specific cut-the-cord estimates are unreliable. Verizon points out discrepancies in the CDC's state-specific data, such as the fact that "the rate of wireless substitution in Oklahoma is 26.2 percent, whereas the rate in California is 9 percent, even though the Commission's data show that there are more wireless subscribers per capita in California (0.88) than in Oklahoma (0.75)."[56] Verizon's solution to such problems with the state-wide data is to urge the Commission to "use the CDC's national cut-the-cord figure with respect to both Rhode Island and the Virginia Beach MSA."[57] But as discussed above, the Commission has already rejected the use of the CDC's national cut-the-cord figure in the *4-MSA Order* for its lack of geographic-specificity and reliability.

Fourth, Verizon asserts that the economic downturn has increased wireless substitution and implies that this increase shows that mobile wireless services are a competitive constraint on wireline services.[58] This is hardly the kind of reliable factual basis upon which an administrative agency must make its decisions. In fact, according to the *TURN Report*, the current state of the economy may be irrelevant to the question of whether mobile wireless service is a substitute for wireline service. Specifically, the *TURN Report* explains that an increase in wireless-only households during a recession does not reflect increased competition between wireline services and mobile wireless services, "but instead reflects an income effect on the household's purchase decision."[59] In other words, "declining incomes lead to [wireless] substitution *out of economic necessity*," not because consumers view mobile

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[53] Verizon April 10th Ex Parte Letter at 5.

[54] *Id.*

[55] *First-Ever State Estimates of Shift from Landlines to Cell Phones*, Associated Press (Mar. 11, 2009).

[56] Verizon April 10th Ex Parte Letter at 6.

[57] *Id.*

[58] *See id.* at 4 & n.11.

[59] *TURN Report* at 14.

wireless service as a widespread substitute for wireline service or because mobile wireless service acts as a constraint on the price of wireline service.[60]

B. Verizon's Pricing Behavior Continues To Demonstrate That There Is Insufficient Competition in the Rhode Island Retail Business Services Market To Justify Forbearance.

In its April 10th Ex Parte Letter, Verizon repeats its argument that it "meets the Commission's forbearance standard with respect to enterprise customers."[61] The Joint Commenters explained in their Rhode Island Opposition, filed more than one year ago, that Verizon's pricing behavior for business services belied its claim that there is sufficient competition in the market for retail business services in Rhode Island to justify forbearance.[62] Indeed, Verizon has continued its trend of increasing prices for these services.

Specifically, a review of Verizon's state tariff filings[63] between September 6, 2006, the date on which it requested forbearance for the Providence MSA (which includes the state of Rhode Island), and March 12, 2009 reveals that Verizon increased prices for retail business services in Rhode Island nearly twenty times.[64] Among the services affected were integrated T-1 services, directory listings, unlimited local usage, unlimited local and toll usage calling plans, business measured 1-party service, Frame Relay, ATM, and private line. In fact, Verizon increased the prices for some of these services more than once during this period. For example, Verizon increased business usage rates (whether per-minute or for unlimited local calling) at least four times.[65] Verizon increased prices for calling features

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[60] *Id.* (emphasis added).

[61] Verizon April 10th Ex Parte Letter at 6. Verizon urges the Commission to ignore GeoResults data submitted by competitors when the FCC conducts its analysis of competition in the retail business services market because such data purportedly "fails to take account of the fact that demand for special access is highly concentrated." *Id.* at 7. But the scope of demand for *special access* is irrelevant to whether the Commission should forbear from requiring Verizon to provide *unbundled network elements*. The relevant inquiry in a UNE forbearance proceeding as it pertains to business customers is whether competitors' networks cover the commercial areas where business customers demand telecommunications services, not just special access services. In fact, competitors serve thousands of business customers in Rhode Island using conditioned copper loops that are unavailable as special access services.

[62] *See* Joint Commenters' Rhode Island Opposition at 34-35 & Attachment F (showing each of Verizon's tariff filings for business services between September 6, 2006 and March 20, 2008).

[63] A chart describing each of Verizon's business services tariff filings with the Rhode Island PUC between September 6, 2006 and April 10, 2009 is attached hereto as Exhibit B.

[64] Elimination or reduction of a discount listed in Exhibit B is counted as a price increase.

[65] *See id.* (citing to RI PUC Dkt. Nos. 3811, 3909, 3910, and 3938).

(either a la carte or as feature packages) at least twice.[66] It also increased rates for Frame Relay, ATM, and private line services three times each.[67]

If there were any merit to Verizon's claims that competition in the retail business services market in Rhode Island is sufficient to justify forbearance *when UNEs are still available*, one would reasonably expect that Verizon would have been forced to lower its rates in order to attract new customers and retain existing ones. The fact that Verizon has instead been able to repeatedly increase rates for many of its business services is *prima facie* evidence that competition in Rhode Island is not sufficient to constrain Verizon's market power in the retail business services market. This problem would obviously become far worse if UNE-based competition were eliminated.

Verizon has argued that its rate increases apply to month-to-month rates, and that its introduction of certain discount programs and package deals for business customers counterbalances the effects of such increases.[68] This argument is baseless. To begin with, Verizon increased rates *nearly twenty times*[69] while it introduced discounts, package deals, or waivers of certain charges *six* times between September 6, 2006 and April 10, 2009.[70] Thus, Verizon's rate increases for business customers far outnumber the discounts, package deals, and waivers that it has introduced during the same period.

Furthermore, the vast majority, if not all, of the discounts and package deals require term commitments of one to three years. For example, Verizon's Unlimited Dial Tone Package for Business and Unlimited CustoPak for Business require one- or three-year commitments.[71] Similarly,

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[66] *See id.* (citing to RI PUC Dkt. Nos. 3811 and 3949).

[67] *See id.* (citing to RI PUC Dkt. Nos. 3772, 3787, 3813, 3895, 3929, 4002, and 4040). While unbundled Frame Relay, ATM, and private line services are not directly implicated by the instant petition, the FCC has several times held that DS1 and DS3 loops, which are covered by the instant petitions, are critical inputs for the provision of these services. *See generally AT&T Inc. and BellSouth Corporation Application for Transfer of Control,* Memorandum Opinion and Order, 22 FCC Rcd. 5662 (2007) ("*AT&T/BellSouth Merger Order*"); *Petition of ACS Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Section 251(c) (3) and 252(d)(1) in the Anchorage Study Area,* Memorandum Opinion and Order, 22 FCC Rcd. 1958 (2007) (*"Anchorage Order"*).

[68] *See* Verizon March 9th Ex Parte Letter at 7; *see also* Verizon Reply Comments, WC Dkt. No. 08-24, n.24 (filed May 12, 2008).

[69] *See generally* Exhibit B.

[70] *See id.* (citing RI PUC Dkt. Nos. 3825, 3852, 3875, 3957, 3964, and 3967).

[71] *See id.* (citing RI PUC Dkt. No. 3852); *see also* Letter from Theresa L. O'Brien, Vice President - Rhode Island Regulatory Affairs, Verizon, to Luly E. Massaro, Commission Clerk, Rhode Island Public Utilities Commission, Docket No. 3852 at 1 (filed June 22, 2007).

Verizon's PRI Plus 20K bundle is available only for two- and three-year terms.[72] And Verizon's waiver of installation charges for a network access line for measured business services applies only in connection with a 24-month term commitment.[73] Moreover, participation in a Verizon discount program does not necessarily immunize a customer from rate increases. For instance, in March 2009, Verizon increased usage charges for customers in its Corporate Rewards Volume Discount Plan that have qualifying monthly billing between $1,500 and $300,000.[74] As the Joint Commenters have explained, the mandatory term commitments associated with such discounts merely restrict, rather than facilitate, competition by locking up customer demand.[75]

Finally, Verizon argues in its March 9th Ex Parte Letter that "[i]t is expected that in a competitive market, such as this one, standard month-to-month rates would be higher than term rates" because "the risks that customers on month-to-month plans will change providers before Verizon has an opportunity to recover the costs of installing the circuit for that customer are much greater."[76] This purported logic is irrelevant to the business markets at issue. Verizon's month-to-month rates are *not* higher *because of competition*. Instead, as explained by Dr. Joseph Farrell in the Commission's special access reform proceeding, an incumbent LEC such as Verizon has an incentive to set month-to-month rates above monopoly levels because doing so will steer customers toward the discounted term plans and bring the discounted prices closer to monopoly levels as well.[77]

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[72] *See id.* (citing RI PUC Dkt. No. 3964); *see also* Letter from Theresa L. O'Brien, Vice President - Rhode Island Regulatory Affairs, Verizon, to Luly E. Massaro, Commission Clerk, Rhode Island Public Utilities Commission, Docket No. 3964 at Attachment (filed May 30, 2008).

[73] *See* Exhibit B (citing RI PUC Dkt. No. 3967).

[74] *See id.* (citing RI PUC Dkt. No. 4046); *see also* Letter from Theresa L. O'Brien, Vice President - Rhode Island Regulatory Affairs, Verizon, to Luly E. Massaro, Commission Clerk, Rhode Island Public Utilities Commission, Docket No. 4046 at 1 (filed Mar. 11, 2009).

[75] *See* Joint Commenters' December 3rd Ex Parte Letter at 13. Some term plans contain automatic renewal plans. For example, Verizon revised its automatic renewal provision for the Corporate Rewards Volume Discount Plan in August 2008. *See* Exhibit B (citing RI PUC Dkt. No. 3981). Previously, the Plan automatically renewed for a one-year term. As of August 2008, the Plan renews for a term equal to the original term of the program—one, two, or three years. *See id.* Obviously, the desired effect is to lock in customer demand for a longer period of time.

[76] Verizon March 9th Ex Parte Letter at 7.

[77] *See* Joint Commenters' December 3rd Ex Parte Letter at 13.

III. Conclusion.

For the foregoing reasons, the Commission should adopt the Joint Commenters' Proposed Standard and deny both of Verizon's pending forbearance petitions.

Respectfully submitted,

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